INDEX

	Page.
ARGUMENT	1–17
I. Mr. Roe's contentions concerning interpretation of section 3, Title I, Espionage Act, and scope of freedom of press and speech correspond to rulings of trial court in case at bar	1
II. First Amendment of Constitution prescribes limitations, in preservation of individual liberties, upon the exercise of all Federal governmental powers and is not itself concerned with the grant or withholding of particular governmental powers or functions to or from the Federal Government. Madison's majority report of Virginia House of Delegates and other documents quoted by Mr. Roe are political pamphlets issued in a heated political campaign. John Marshall wrote a minority report, upholding the constitutionality of the Sedition Act and interpreting Federal powers and the First Amendment in accordance with the later and settled adjudications of this Court. Sedition Act was a general statute directed at seditious libels and not analogous to Espionage Act, which is directed at wilful obstruction of a special exercise of the Federal power to raise armies	7
III. First Amendment designed to preserve for the United States certain existing and recognized constitutional liberties and not to create novel principles of law	16

102410—19——1

and is an attempt case. Confusion rather than clarification of thought results from a discussion of issues which may be pertinent to other cases arising under the same law, but are not pertinent to the actual issues and actual facts of the case at bar. Mr. Roe's points will therefore be discussed here only in so far as they are pertinent to this case.

The Government agrees with Mr. Roe that Title I of the Espionage Act deals exclusively with overt acts directed against the military measures and program of the Government. A long speech before a large audience is surely an overt act. The defendant, Debs, was charged with an attempt to cause insubordination in the military forces and to influence military eligibles against military service. Certainly such interference is directed against the military measures of the Government. The interpretation of the Espionage Act as applied in this case corresponds entirely to that contended for by Mr. Roe.

The Government also thoroughly agrees with Mr. Roe that Congress has not the power to punish belief or opinion as such. The right to criticize the Government's policies and actions is so essential to democracy, that in any definition of the freedom of speech and press, that right would be acknowledged. The defendant was not prosecuted for hostile criticism of the war. He was prosecuted for a wilful and deliberate attempt to obstruct the execution of a Government policy, namely, to obstruct the process of raising an army; and, under no definition of freedom

of speech for which any authority could be adduced, is the privilege given of wilfully and deliberately obstructing the execution of a lawfully adopted governmental policy, though the means or instrumentality used for that obstruction be the utterance or printing of words.

In view of this agreement upon the interpretation of the Espionage Act and the meaning of the constitutional guarantee of free speech and press, what is the issue raised by Mr. Roe's brief? It is this: Mr. Roe claims, that by reason of the temper of the public during a war, a law directed at obstruction of the prosecution of the war will inevitably be applied so as to suppress all critical discussion of the war, and that the Espionage Act, as applied by courts and juries, has produced that effect. In his zeal for free speech, however, he appears willing to or desirous of subverting several vital features of the Constitution of the United States, namely, the jury system and the separation of executive, legislative, and judicial powers. If a trial be free from prejudicial errors and the verdict finds support in the evidence, then the vice, if any, which exists in that verdict must either be inherent in the policy of the law under which the case was prosecuted, a consideration falling exclusively within the domain of the legislative branch of the Government, or must be one which the President alone, by act of executive clemency, can correct. Mr. Roe's plea amounts to an appeal to this court to ignore the constitutional limitations of its functions

and correct what he conceives to be a mistaken legislative policy or mistaken, though lawful, verdicts.

Narrowing this discussion, then, to those issues which do properly fall within the scope of this case, as Mr. Roe does not refer to any errors in the admission of evidence or in the interpretation of the language of the statute nor to the facts of this case at all, his arguments, in so far as they relate to this case, must be in effect, that the trial court applied a definition or conception of the constitutional guaranty of free speech which is contrary to the true and correct definition or conception.

But, in the case at bar, the trial court gave to the constitutional right of free speech a scope and meaning fully corresponding to Mr. Roe's contentions. In his charge to the jury the trial judge said (R. 274):

> * * * The law does not forbid differences of opinion or reasonable discussion as to the causes which induced Congress to declare war, or as to the results to be attained by war, or at the end of the war, nor the time and conditions under which the war should be brought to an end, nor any reasonable and tempered discussions and differences of opinion upon any or all of the measures or policies adopted in carrying on the war. The law is limited to making it a crime to oppose by word or act the military measures taken by the United States, or under lawful authority by the officers of the United States for the purpose of prosecuting that war to a successful end.

And again (R. 279, 280):

> In passing upon the question of specific intent, I wish to say something additional thereto. Disapproval of war is, of course, not a crime, nor is the advocacy of peace a crime under this law, unless the words or utterances by which the expression or advocacy is conveyed shall have been wilfully intended by the person making them to commit the acts forbidden by this law, and, further, not even then unless the natural and reasonably probable tendency and effect of such words and language as he may use will have the effect and consequences forbidden by the law.
>
> Every citizen, I say to you, notwithstanding the Espionage Law, has the right, without intending to cause insubordination, disloyalty, or refusal of duty, or without intending to obstruct the recruiting or enlistment service of the United States, or without intending to resist the United States, or to promote the cause and success of its enemies, or oppose the cause of the United States, to discuss, criticize, or disapprove of any law proposed or in existence, or of any policy proposed or in existence, made for the purpose of carrying on the war.
>
> If you shall find from the evidence here that the defendant did nothing more than that by this public speech and utterance, and intended nothing more than that by this public speech and utterance; or even if you find that he intended more than that, but the natural and reasonably probable consequences of what he

said and did would be to produce no ot
result or effect in the minds of his hear
then he is not guilty, and it will be your d
in the discharge of your oath to find him
guilty.

If the conscious purpose of the defend
was only to state the truth as he saw it
convey information to his fellow citizens, w
the object only of bringing about the rec
struction or reshapement, by peaceful, ordin
methods, of the national policy in accordan
with what he believed to be the right and c
rect view of the national policy, and that
did not in so doing have the intent wilfu
to do any of the prohibited acts, he would n
in that event be guilty, and it would be yo
duty, also, to return a verdict of not guilt
An offense under this law, as I have said
to you, and I repeat, is committed only wh
the defendant has the specific, wilful, cri
inal intent, such as has been defined, and t
words and utterances have a natural and re
sonably probable tendency to cause the resul
which have been forbidden by these prov
sions of the Espionage Law.

The charge to the jury in this case might well
quoted as authority for Mr. Roe's contentions. An
as shown in the Government's main brief, the evidenc
amply supports the verdict.

II.

First Amendment of Constitution prescribes limitations, in preservation of individual liberties, upon the exercise of all Federal governmental powers and is not itself concerned with the grant or withholding of particular governmental powers or functions to or from the Federal Government. Madison's majority report of Virginia House of Delegates and other documents quoted by Mr. Roe are political pamphlets issued in a heated political campaign. John Marshall wrote a minority report upholding the constitutionality of the Sedition Act and interpreting Federal powers and the First Amendment in accordance with the later and settled adjudications of this court. Sedition Act was a general statute directed at seditious libels and not analogous to Espionage Act, which is directed at wilful obstruction of a special exercise of the Federal power to raise armies.

In the course of his argument Mr. Roe seeks to develop the proposition that the First Amendment specifies a certain field of governmental powers or functions from which the Federal Government is entirely excluded. This is a fallacious conception of the First Amendment, its nature and purpose. As pointed out in the authorities cited in the main brief, the First Amendment does not deal with the grant or withholding of governmental powers, nor the distribution of governmental powers as between the Nation and the States. It is a part of the Bill of Rights, which specifies certain recognized liberties of the individual which the Federal Government is prohibited from infringing in the course of the exercise of any of the governmental powers entrusted to it.

The word "abridge" necessarily implies the ex
and recognition of limitations upon freedom o
and speech; and the nature of these limitati
therefore, the object of inquiry when the First A
ment is invoked. As shown in the Govern
main brief, the liberty of press and speech has
included the right to advocate violation of law
obstruct the carrying out of a governmental
and any Federal power, such as the power t
armies, necessarily includes the power to
wilful obstruction of the exercise of that powe

In view, however, of the assertion made in
briefs for defendants before this court and
reiterated elsewhere that the true interpretat
the First Amendment is to be found in the Ken
Resolutions and the report written by Madis
the Virginia House of Delegates, we respectful
the attention of the court to the fact, that a
time there were presented to the people, by e
eminent authorities, statements setting forth
ferent interpretation of the First Amendmen
the interpretation subsequently adopted by
court. For example, the House of Represent
on February 25, 1799, sitting as the Committee
Whole, received the report of a Select Committ
the petitions praying for a repeal of the Alie
Sedition laws. In this report this committe
clared *inter alia* that the liberty of the press con
not in license for every man to publish wh
pleased without being liable to punishment, but

permission to publish without previous restraint whatever he might think proper, being answerable to the public and to individuals for any abuse of this permission to their prejudice. (See Annals of Congress, 5th Congress, 1797–1799, Vol. 3, pp. 2986, 2989.)

In discussing this particular question, the brief of the *amicus curiae* refers to the Sedition Act of 1798 and quotes extensively from the political literature circulated in 1798 and 1799. As the Government pointed out in its main brief, the Sedition Act, which attempted to reach seditious and false utterances aimed at the Government, is in no way analogous to the Espionage Act as interpreted in the case at bar, which is based squarely on the constitutional ground of power of Congress to raise armies. An extensive discussion of the Sedition Act leads into irrelevant fields and tends to becloud the issues. It is true, however, that a discussion of the meaning of the First Amendment was brought forth by the political controversy over the constitutionality of the old Sedition Act. But in defining the scope of the constitutional guarantees, it must constantly be borne in mind that all of the contemporaneous discussions, including the assertions made in Jefferson's Kentucky Resolutions and Madison's report on the Virginia Resolutions, were discussions made in the heat of the antifederalist election campaign of 1798 and 1799, and that, after all, these resolutions and reports have distinctly the character of partisan documents put forth in the heat of a bitter political contest.

In discussing the historical origin of t
ment, we deem it important to call atte
fact that text writers, as well as brief w
overemphasized the importance of the
forth in the resolutions referred to.
written by Madison was in reality an ap
people by the majority of the Virginia
Delegates. But it must not be forgotte
Minority of the Virginia House of Del
made a report at the same time, subseque
as an appeal to the people, in which was
expressed the interpretation of the Firs
ment contended for by the Governme
instant case. It is a historical fact, long
of, that this so-called minority report wa
written by John Marshall, at that time a
for Congress. The circumstances which
forth this minority appeal, Marshall's a
and its contents are fully described in vo
Albert J. Beveridge's "The Life of John M
pages 401–406, in which the following
occur:

> This "Address" of the Virginia L
> was aimed primarily at Marshall, wh
> far the most important Federalist can
> Congress in the entire State. It was
> at public expense and Marshall's frie
> not possibly get his views before the
> authoritatively or so widely. But
> their best, for it was plain that M
> Jeffersonized appeal, so uncharacteristi
> former Nationalist, must be answere

shall wrote the reply of the minority of the Legislature, who could not "remain silent under the unprecedented" attack of Madison. "Reluctantly," then, they "presented the present crisis plainly before" the people.

* * * * *

The House of Delegates, by a vote of 92 against 52 refused to publish the address of the minority along with that of the majority. Thereupon the Federalists printed and circulated it as a campaign document. It was so admired by the supporters of the Administration in Philadelphia that, according to the untrustworthy Callender, 10,000 copies were printed in the Capital and widely distributed.

Marshall's authorship of this paper was not popularly known; and it produced little effect.

* * *

These political pamphlets were early guns in that contest between Federal and State rights and between strict and broad construction of the Constitution, in which Marshall's views prevailed and later embodied in *McCulloch* v. *Maryland*, 4 Wheat. 316 and the great decisions of that era. The principle of implied and necessary Federal powers is surely too well settled to be reopened at this late date.

An original copy of this minority document, written by John Marshall and printed as a campaign pamphlet, is entitled, "The Address of the Minority in the Virginia Legislature to the People of that State; containing a Vindication of the Constitutionality of the Alien and Sedition Laws," and will be found in the Library of Congress, catalogued "Class E 327—Book A 22." The discussion of the constitutionality

of the Sedition Law begins on page
ceeds:

> To contend that there does not
> to punish writings coming withi
> tion of this law, would be to asser
> of our nation to preserve its own
> protect themselves from the
> wicked citizens, who incapable o
> selves, are incessantly employed
> means to disturb the public repos
>
> Government is instituted and
> the general happiness and safety
> therefore are interested in its
> and have a right to adopt mea
> security, as well against secret p
> hostility. But government can
> secured, if, by falsehood and malic
> it is to be deprived of the confiden
> tion of the people. It is in vain
> truth will prevail, and that sland
> tected, recoils on the calumniato
> perience of the world, and our own
> prove that a continued course of
> will at length sully the fairest rep
> will throw suspicion on the purc
> Although the calumnies of the f
> discontented may not poison the
> majority of the citizens, yet they
> very considerable number, and pr
> to deeds destructive of the public
> dangerous to the general safety.
> people have a right to prevent; an
> in all the nations of the earth, wh
> are known, some corrective of
> tiousness has been deemed indispen

it is contended, that though this may be theoretically true, such is the peculiar structure of our Government, that this power has either never been confided to, or has been withdrawn from the legislature of the Union. We will examine these positions. The power of making all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the government of the United States, or in any department or office thereof, is by the concluding clause of the eighth section of the first article, expressly delegated to Congress. This clause is admitted to authorize Congress to pass any act for the punishment of those who would resist the execution of the law, because such an act would be incontestably necessary and proper for carrying into execution the powers vested in the Government. If it authorizes the punishment of actual resistance, does it not also authorize the punishment of those acts which are criminal in themselves, and which obviously lead to and prepare resistance? Would it not be strange, if, for the purpose of executing the legitimate powers of the Government, a clause like that which has been cited should be so construed as to permit the passage of laws punishing open resistance, and yet to forbid the passage of laws punishing acts which constitute the germ from which resistance springs? That the Government must look on, and see preparations for resistance which it shall be unable to control, until they shall break out in open force? This would be a unreasonable and improvident construction of the article under consideration.

Then follows a discussion of the dangers arising from seditious libels and an argument derived from the definition of the judicial power of the United States in the second section of the Third Article of the Constitution. The address then proceeds with the following clear and convincing definition of the meaning of the First Amendment:

> That such was the contemporaneous construction of the Constitution is obvious from one of the amendments which have been made to it. The *3d* amendment, which declares that Congress shall make no law abridging the liberty of the press, is a general construction made by all America on the original instrument, admitting its application to the subject. It would have been certainly unnecessary thus to have modified the legislative powers of Congress concerning the press if the power itself does not exist.
>
> But although the original Constitution may be supposed to have enabled the Government to defend itself against false and malicious libels endangering the peace and threatening the tranquillity of the American people, yet *is* is contended the *3d* amendment to that instrument has deprived it of this power.
>
> The amendment is in these words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press."
>
> In a solemn instrument as is a constitution, words are well weighed and considered before they are adopted. A remarkable di-

versity of expression is not used, unless it be designed to manifest a difference of intention. Congress is prohibited from making any law respecting a religious establishment, but not from making any law respecting the press. When the power of Congress relative to the press is to be limited, the word *respecting* is dropt, and Congress is only restrained from passing any law abridging its liberty. This difference of expression with respect to religion and the press manifests a difference of intention with respect to the power of the national legislature over these subjects, both in the person who drew and in those who adopted this amendment.

All abridgment of the freedom of the press is forbidden, but it is only an abridgment of that freedom which is forbidden. It becomes, then, necessary, in order to determine whether the act in question be unconstitutional or not, to inquire whether it does in fact ABRIDGE the freedom of the press.

The act is believed not to have that operation for two reasons.

1st. A punishment of the licentiousness is not considered as a restriction of the freedom of the press.

2. The act complained of does not punish any writing not before punishable, nor does it inflict a more severe penalty than that to which the same writing was before liable.

1st. If by freedom of the press is meant a perfect exemption from all punishment for whatever may be published, that freedom

> never has and most probably never will exist. It is known to all that the person who writes or publishes a libel may be both sued and indicted and must bear the penalty which the judgment of his country inflicts upon him. It is also known to all that the person who shall libel the government of the State, is for that offense punishable in the like manner. Yet this liability to punishment for slanderous and malicious publications has never been considered as detracting from the liberty of the press. In fact the liberty of the press is a term which has a definite and appropriate signification completely understood. It signifies a liberty to publish, free from previous restraint, anything and everything at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders, which may destroy the peace and mangle the reputation of an individual or of a community.

III.

First Amendment designed to preserve for the United States certain existing and recognized constitutional liberties and not to create novel principles of law.

One other misconception crept into Mr. Roe's discussion of the First Amendment, illustrated by the sentence on page 25 of his brief:

> It would at least be as probable in the absence of any other evidence that this provision of the Constitution, like others, was adopted to destroy British tyranny rather than to perpetuate it.

This court, however, has repeatedly stated that the early amendments of the Constitution were designed to preserve certain liberties, which had been won and become fixed in the Constitution of England. In *Brown* v. *Walker*, 161 U. S. 591, at page 600, this court said:

> * * * As the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them.

And, similarly, in *Robertson* v. *Baldwin*, 165 U. S. 275, 281, this court, at page 281, said:

> * * * The law is perfectly well settled that the first ten amendments to the Constitution * * * were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors and which had from time immemorial been subject to certain well-recognized exceptions * * *.

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Attorney General for War Work.

ALFRED BETTMAN,
Special Assistant to the
Attorney General.

JANUARY, 1919.

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